## MALAYSIAN REPORTS

# DATUK JAGINDAR SINGH & ORS. v. TARA RAJARATNAM

[F.C. (Lee Hun Hoe C.J. (Borneo), Salleh Abas C.J. (Malaya), & Abdoolcader F.J.) January 10-15, 18-20 & May 16, 1983]

[Kuala Lumpur – Federal Court Civil Appeal Nos. 215, 216, 291 and 292 of 1982)

*Legal Profession – Solicitor-client relationship – Transfer of land – Outright sale or security – Fraud – Breach of trust – Undue influence – Breach of agreement – Damages.*

*Land Law – Transfer of land – Whether outright sale or security – Fraud – Valuation – Evidence of expert – National Land Code, s. 340(2).*

*Contract – Fraud – Undue influence – Damages – Contracts Act, 1950, s. 16 & 24.*

In this case the respondent, the registered proprietor of land alleged that she was induced by the fraud and undue influence of the 1st and 2nd appellants to transfer the land to the 2nd appellant. The respondent claimed that when the land was transferred it was transferred as a security and there were two undertakings, (1) that the land would not be sold to anyone for one year without the consent of the respondent (2) that the land would be transferred back to the respondent on her repaying the $220,000/– within one year. Contrary to these undertakings the 2nd appellant some eighteen days later transferred the property to the 3rd appellant. Subsequently the land was again transferred to a land development company almost wholly owned by the 1st appellant. The land was eventually subdivided and sold to the public. The appellants were advocates and solicitors. The learned trial judge found that the appellants were guilty of fraud, breach of agreement and undue influence ([1983] 2 M.L.J. 127). The appellants appealed.

**Held:** (1) in this case it was clear from the correspondence that the 1st and 2nd appellants were acting for the respondent and there was a solicitor-client relationship between them;

(2) on the evidence the learned judge was entitled to take the view that the appellants were not honest in that the 1st and 2nd appellants never really intended to fulfil the conditions of the agreement and that all they wanted was to get the respondent to sign the transfer form so that they could lay their hands on the property. As regards the 3rd appellant he colluded with the other appellants to get possession of the property;

(3) the learned trial judge was correct in holding that the agreement was a security agreement and did not constitute an outright transfer of the land;

(4) the learned trial judge was not wrong in holding that the transaction was unconscionable and that the burden was on the appellants to rebut the presumption of undue influence;

(5) in this case the learned trial judge exercised his discretion correctly in awarding damages for fraud and in not deducting the sums paid by the appellants in payment of overdrafts to the banks as the sums were paid in pursuance and furtherance of the fraud.

*Cases referred to:–*

(1) *Tara Rajaratnam* v. *Datuk Jagindar Singh & Ors.* [1981] 1 M.L.J. 232.
(2) *Jagindar Singh & Ors.* v. *Attorney-General* [1983] 1 M.L.J. 71.
(3) *Barclays Bank* v. *Cole* [1967] 2 Q.B. 738.
(4) *Derry* v. *Peek* (1889) 14 App. Cas. 337.
(5) *Assets Company Ltd.* v. *Mere Roihi & Ors.* [1905] A.C. 176.
(6) *Waimiha Sawmilling Company Ltd.* v. *Waione Timber Company Ltd.* [1926] A.C. 101, 106, 107.
(7) *Butler* v. *Fairclough & Anor.* (1917) 23 C.L.R. 78.
(8) *Haji Junus* v. *Chik & Anor.* [1964] M.L.J. 343.
(9) *Mohamed Isa* v. *Haji Ibrahim* [1968] 1 M.L.J. 186.
(10) *Public Finance Ltd.* v. *Narayanasamy* [1971] 2 M.L.J. 32.
(11) *Jasbir Kaur* v. *Tharumber Singh* [1974] 1 M.L.J. 224.
(12) *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.* [1913] A.C. 491, 502.
(13) *Arul Chandran* v. *Tara Rajaratnam* [1979] 2 M.L.J. 172.
(14) *Edgington* v. *Fitzmaurice* (1885) 29 Ch. D. 459.
(15) *Haji Abdul Rahman & Anor.* v. *Mohamed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.
(16) *Bachan Singh* v. *Mahinder Kaur & Ors.* [1956] M.L.J. 97.
(17) *Terrapin International Ltd.* v. *Inland Revenue Commissioners* [1976] 1 W.L.R. 665.
(18) *Inche Noriah* v. *Shaik Allie bin Omar* [1929] A.C. 127; 1 M.C. 79.
(19) *Allison* v. *Clayhills* (1908) 97 L.T. 709.
(20) *Edwards* v. *Williams* (1863) 32 L.J. Ch. 763.
(21) *Jordan* v. *Money* (1854) 5 H.L.C. 185; 10 E.R. 868.
(22) *Loi Hieng Chiong* v. *Kon Tek Shin* [1983] 1 M.L.J. 31, 33.
(23) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143.
(24) *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1.

The following cases were also cited in argument –

(1) *Poosathurai* v. *Kannappa Chettiar & Ors.* L.R. (1919-20) 47 I.A. 1.
(2) *Western Bank of Scotland* v. *Addie* (1867) L.R. 1 H.L. S.C. 145.
(3) *Steedman* v. *Frigidaire Corporation* [1932] W.N. 248.
(4) *George Wimpey & Co. Ltd.* v. *Sohn & Anor.* [1967] 1 Ch. 487.
(5) *Brikom Investments Ltd.* v. *Carr* [1979] 2 W.L.R. 737.
(6) *City and Westminster Properties* v. *Mudd* [1959] Ch. 129.
(7) *Saminathan* v. *Pappa* [1981] 1 M.L.J. 121, 123.
(8) *A. Kanapathi Pillay* v. *Joseph Chong* [1981] 2 M.L.J. 117.

(9) *Chapple* v. *Electrical Trades Union & Ors.* [1961] 1 W.L.R. 1290.
(10) *Nanyang Manufacturing Co.* v. *The Collector of Land Revenue, Johore* [1954] M.L.J. 69 & 71.
(11) *Hock Lim Estate Sdn. Bhd.* v. *Collector of Land Revenue, Johore Bahru* [1980] 1 M.L.J. 210 & 211.
(12) *Abdul Rahim* v. *Secretary of State* A.I.R. 1926 Lahore 618.
(13) *Pribhu Diyal* v. *Secretary of State* (1932) 135 I.C. 183.
(14) *K.E.P. Mohd. Ali* v. *K.E.P. Mohd. Ismail* [1981] 2 M.L.J. 10.
(15) *Playing Cards (M) Sdn. Bhd.* v. *China Mutual Nagivation Co. Ltd.* [1980] 2 M.L.J. 182.
(16) *Esso Petroleum Co. Ltd.* v. *Southport Corpo-Ration* [1956] 2 W.L.R. 81.
(17) *Siti Aisha Binte Ibrahim* v. *Goh Cheng Hwai* [1982] 2 M.L.J. 124.
(18) *Collector of Land Revenue* v. *Alagappa Chettiar* [1971] 1 M.L.J. 43.
(19) *Singma Sawmill Co Sdn. Bhd.* v. *Asian Holdings (Industralised Buildings) Sdn. Bhd.* [1980] 1 M.L.J. 21.
(20) *Bain* v. *Fothergill* (1874-5) L.R. 7 H.L. 158.

FEDERAL COURT.

*Terrence Cullen* Q.C. (*Ronald T.S. Khoo* and *Chin Yew Meng*) for the appellants.

*H.E. Cashin* (*Subra Naicker* with him) for the respondent.

*Cur. Adv. Vult.*

**Lee Hun Hoe C.J. (Borneo)** (delivering the Judgment of the Court, read by Salleh Abas C.J. (Malaya)): This is an appeal against the decision of Abdul Razak, J. It is a sad case and has a very chequered history. Mr. Terrence Cullen, Q.C. appeared for the appellants with Mr. Ronald Khoo and Mr. Chin Yew Meng while Mr. Howard Cashin and Mr. Subra Naicker were for the respondent.

*The Facts*

The respondent (Tara) was the registered proprietor of a piece of land of some 5 acres (the property) at Kulai, Johore. There was a house on it. She lived there with her late husband (Devan) and their five daughters. Dr. Das was the brother of Devan. The three appellants are advocates and solicitors. The 1st appellant (Jagindar) and the 2nd appellant (Suppiah) are partners practising under the style of Suppiah & Singh in Johore. The 3rd appellant (Arul) was a partner in the Singapore firm of Rodyk & Davidson. The story began with the financial difficulty of Dr. Das after starting a computer medical centre in Singapore called Medidata. He and Jagindar knew one another in their student days in London. So with Jagindar as guarantor he managed to obtain overdraft facilities from the Hongkong & Shanghai Banking Corporation in Singapore (HKBC) up to a limit of $120,000.00 He gave Jagindar to understand it was for a short period. To protect himself Jagindar pressed Dr. Das to put up certain security in the event that he was called to honour the guarantee. The HKBC did not press Dr. Das for payment. Jagindar refused the offer of a second mortgage on Dr. Das's property in Johore. But he showed interest in Tara's property. Dr. Das consulted Devan who persuaded Tara to put up the property as security. At that time Tara and Devan had an overdraft with the Chung Khiaw Bank (CKB) in respect of which the property was charged.

On March, 30, 1974 Suppiah, Jagindar and Sivanathan came to Tara's house. She was asked to sign various documents. Before signing she read through part of the agreement and was not happy with the matter as nothing was said of the fact that the property was to be used as security for the payment of two sums of $110,000.00 each. She questioned Suppiah about the use of the word "transfer" when the transaction was going to be a security. In answer Suppiah said the security was by way of transfer. As a result of her inquiry Suppiah inserted the manuscript to the agreement. On April 27, 1974 Jagindar paid the HKBC $121,819.80. More than a year later he paid CKB $92,000.00 and CKB was obliged to discharge the charges. He also attested the transfer form which Tara signed earlier when he entered into the agreement. He also inserted the date July 5, 1975 on the transfer form indicating that Tara transferred the property to Suppiah on that date. The transfer was registered on July 22, 1975. Some 18 days later Suppiah transferred the property for the same amount to Arul on August 9, 1975. Later on instruction from Jagindar the property was transferred to Jet Age Construction Company which was almost wholly owned by Jagindar for $361,114.00. Although Arul received no payment the account book showed the company owed him the amount. The property was eventually subdivided into 70 lots and sold to the public. So Tara was unable to get the property back.

Between March 30, 1974 and May 1975 various letters, documents and correspondence passed between Suppiah & Singh and CKB, Devan, Yeow & Chin, Department of Inland Revenue and Office of Pengarah Tanah dan Galian. In May 1975 Suppiah obtained judgment against Dr. Das

for $149,000.00 in Singapore and the same was registered at the High Court at Johore Bahru. In early 1976 applications for subdivision in respect of the property were made in the name of Arul by Suppiah & Singh through a firm of surveyors and architects. In early March, 1976 Devan and Tara each received a notice to quit dated March 4, 1976 from Suppiah & Singh acting for Arul. They refused to quit and the dispute came before the court. What happened thereafter is a matter of going through the court records. Every technical and procedural point that one can think of was taken against Tara's claim. The history of the various proceedings was summarized not only by the learned Judge but also by Wan Suleiman, F.J. sitting with Hashim Yeop Sani, J., as he then was, and the late Ibrahim Manan, F.J. in *Tara Rajaratnam* v. *Datuk Jagindar Singh & Ors.*[1] In delivering the judgment of the court Wan Suleiman, F.J. criticized the Judicial Commissioner for striking out the statement of claim and giving leave to file fresh action on two occasions. He could see no reason why leave of the court was necessary to file fresh action arising out of a different cause of action unless the Judicial Commissioner did not understand his own orders. In rejecting the plea of *res judicata,* the court took the view that the two orders granting Tara liberty to file fresh action could only mean that no final decision had been pronounced so as to estop Tara in any subsequent litigation from disputing or questioning such decision on merits.

So much has been said about the purport of P.30 and P.31 that it would be better to set them out in full. P.31 is in actual fact a continuation of P.30 which reads:–

"I TARA RAJARATNAM(f) NRIC No. 2317344 of No.76, Main Road, Kulai, Johore, proprietor of the land described in the Schedule below and the house erected thereon and known as KLBSK 681, Kulai Besar, Kulai, Johore, hereby confirm that the consideration of $220,000.00 referred to in the Transfer executed by me in respect of the said land in favour of PARKRISAMY SUPPIAH of No.33, Jalan Keruing, Kebun Teh Park, Johore Bahru is arrived at as follows:–

(a) in consideration of the said P. SUPPIAH paying the sum of Dollars $103,658.44 which is the amount due from me to the CHUNG KHIAW BANK Kulai Branch, as at March 8, 1974 as stated in their letter dated March 14, 1974 which is attached herewith and marked "A" on the Charges executed by me in their favour and a further sum of $6,341.56 (making in all $110,000.00) part of which is for additional interest payable to the said Bank as from March 9, 1974 to the date of Transfer and the balance is to be received by me.

(b) a further sum of $110,000.00 is in consideration of the said P. SUPPIAH paying Datuk JAGINDAR SINGH of No.41, Jalan Waspada, Johore Bahru, being the amount payable by my brother-in-law Dr. KRISHNA SHIVADAS (also known as Dr. Das) of No.25, Jalan Waspada, Johore Bahru, to the said Datuk JAGINDAR SINGH who will be paying to the HONGKONG & SHANGHAI BANK, Collyer Quay, Singapore the sum of $110,000.00 (which I hereby agree) being the loan granted to my said brother-in-law by the said Bank on the guarantee given by the said Datuk JAGINDAR SINGH.

Dated this March 30, 1974.

Witnessed by
K.V. Devan

Signed by the abovenamed
Tara Rajaratnam"

P.31 reads:–

"I, the above named Pakrisamy Suppiah hereby confirm, agree, and undertake not to sell the said land and house to anyone for one year without the consent of the said Tara Rajaratnam(f) and further undertake to transfer the said land and house to her within one year in the event of her paying me the sum of $220,000.00 (Dollars two hundred and twenty thousand only) the consideration mentioned as above.

Witnessed by
C. Sivanathan

Signed by
P. Suppiah".

The Schedule referred to above

| Mukim | Lot No. | Description and No. of Title | Share of land (if any) | Registered No. of lease/sub lease (if any) | Registered No. of charge (if any) |
|---|---|---|---|---|---|
| Senai- | 6025 | Certificate of Title No. 13817 for area 5A. OR. OOP or thereabouts | whole | nil | nil |

*Solicitor/Client Relationship*

Mr. Cullen submitted that the charges of fraud and undue influence were based on a solicitor-client relationship and that such a relationship had not been established between the appellants and the respondent at the trial. From the correspondence it seems clear that Suppiah & Singh were acting for Tara though they said they were merely assisting as they sent no bill. The fact that they did not bill Tara or Devan is no ground for saying they did not act for Tara. We need only refer to a few letters to see whether the relationship existed.

On March 12, 1974 Suppiah & Singh wrote to the CKB in the following terms (P.27):–

"We act for Madam Tara Rajaratnam who had been given overdraft facilities up to a maximum of $110,000.00 by your bank in 1966 on a charge of her property. The overdraft account is operated by her husband Mr. K.V. Devan (Account No. 146) of 681, Kulai Besar, Kulai.

As our client wishes to pay off the charges by charging the said property for an increased amount, we would appreciate it very much if you could let us have a statement showing the amount due to your bank and the title deeds to the property on our usual undertaking for the above purpose."

The letter speaks for itself in no uncertain term. No Bank would allow them to have a statement of account or title deed of a customer unless they are acting for the customer. On March 14, 1974 the CKB replied and advised them that the balance of the account as at March 8, 1974 was $103,658.44 with interest at 11.5% per annum. The title deeds and duplicate charges were enclosed for them to prepare the discharge of the charge. Nothing was heard from them. So on June 10, 1974 the CKB referred to their earlier letter and enquired about the matter. When the bank received no response the bank wrote direct to Devan on September 16, 1974. On October 25, 1974 the CKB asked for the return of the title deeds and the duplicate charge. Suppiah & Singh tried their best to hold on to the documents by stating on November 12, 1974 that "steps are being taken to have the property discharged within the next 21 days." They continuously obtained information from the CKB. They could not do so unless they were acting for Devan and Tara. On December 26, 1974 the bank referred to their request to confirm the balance of $116,596.25 for discharge and continued as follows:–

"As this is the second time that we have been informed by you of our customer's intention to repay the overdraft and have the property discharged and to which both have not materialised, we have no alternative but to request you to return to us on receipt of this letter the title deeds and documents pertaining to the property."

They replied on December 29, 1974 by referring to the above letter and stating:–

"We have, however, written to our clients to give us instructions whether they would pay the balance due to you on the charge and if we did not hear from them we would return all the title deeds within the next 10 days."

If, as was submitted, the agreement was an outright sale we could not see the purport of the above letter. Why take instructions from "our clients" from whom Suppiah had bought the property outright? Suppiah should have made payment within a reasonable time after the signing of the agreement. The learned Judge found that Suppiah never intended to buy. He was merely waiting for instruction from Jagindar. Such a situation could not have arisen if the agreement was an outright sale as claimed by the appellants as they allowed the debts to grow.

On January 30, 1975 they returned the title deeds and duplicate charges to CKB. Then on February 2, 1975 they wrote to CKB to say they were acting for Suppiah "to whom the owner of the above land Tara Rajaratnam had sold the property subject to the charges ..." They asked for the title deeds and duplicate charges again to prepare the discharge of the charge. After this letter no copy was sent to Devan. Apparently, they did not want him to know what was going on. Suppiah & Singh did not appear to be very ethical because they could have told CKB that Suppiah bought the property immediately after March 30, 1974 as they maintained it was an outright sale. They did not do so because Suppiah had no intention of discharging the charges and of carrying out the terms set out in the agreement. One thing is clear from the correspondence and conduct of the appellants that Suppiah & Singh were acting as solicitors for Devan and Tara in connection with the agreement of March 30, 1974. Yeow & Chin never acted for Tara except for the purpose of the discharge of the charge. If Suppiah & Singh as a firm of solicitors of which Suppiah and Jagindar were partners were acting for Tara and Devan at the time then quite clearly what happened on March 30, 1974 was thoroughly reprehensible on the part of Suppiah and Jagindar. If they were not acting but assisting as they claimed then in such a situation they should have informed Tara of the fact and advised her to get independent legal advice to safeguard her interest.

*Fraud and Breach of Trust*

Mr. Cullen submitted that the learned Judge was wrong in law when ruling on allegations of fraud and breach of trust. Because of this the learned Judge wrongly found the appellants guilty of contempt without formulating specific charges. This has been corrected in *Jagindar Singh & Ors.* v. *Attorney-General*[2] and no more need be said. It is the submission of Mr. Cullen that only the claim based on contract was one of pure fact while fraud and misrepresentation were based more on questions of law. Neither the learned Judge nor the respondent's counsel asked the

two questions – what did the appellants hope to gain and what was their prospect of not being caught. Based on the learned Judge's finding of the value of the property the most each appellant would gain would not be more than $150,000.00. According to Mr. Cullen this would not be enough to start a new life elsewhere. We do not think the test which Mr. Cullen would want everyone to follow is appropriate. We are not dealing with a case of a trickster who, in one swoop, hopes to make his fortune and to fly elsewhere to enjoy his ill-gotten gain. We are dealing with professional men who take advantage of their status and occupation to lure the unwary clients into parting with their property and making sure that they could not recover their property back. They act with such confidence because the prospect of their being brought to court is very slight by reason of costs and inconvenience to the clients.

Mr. Cashin had made clear that he was not relying on common law fraud but rather on actual fraud as laid down under section 340 of the National Land Code. Mr. Cullen contended that fraud must be pleaded and proved and that in this case the pleadings were drafted contrary to the rules. He submitted that section 340 does not give rise to damages. It merely allows the court to set aside the transfer. Here the court could not do so. Therefore, section 340 is out. Further, fraud is used in many statutes. The remedy is the amount of profit. He referred to section 17(a) of the Contracts Act which clearly points to an ingredient of common law fraud. He did not know how wide section 340 was but submitted that the section would not be relevant to the present action. He contended that when the action commenced section 340 went out of the window as the land had already been transferred. It is the very case of the respondent that the appellants deliberately obtained the transfer form with the intention of using the transfer form to secure the property and then to enable Suppiah to transfer it to Arul in such haste as to prevent Tara from recovering her property. To make it doubly sure Jagindar further caused Arul to transfer the property to Jet Age Construction Company (in which Jagindar held a majority share). Eventually, the company sold the property in small lots to the public.

It is the submission of Mr. Cullen that in civil action fraud has a special meaning. It does not mean merely general dishonesty. Fraud has a precise meaning. He cited *Barclays Bank Ltd.* v. *Cole*[3] where at page 743 Denning, M.R. answered Mr. Ashe Lincoln's contention that a charge of robbery includes fraud as follows:–

"... Robbery includes stealing, he says and stealing includes fraud. I cannot accept this argument. 'Fraud' in ordinary speech means the using of false representations to obtain an unjust advantage: see the definition in the Shorter Oxford English Dictionary. Likewise in law 'fraud' is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false: see *Derry* v. *Peek*[4] per Lord Herschell. In any case, 'fraud' involves a false representation. Robbery does not. It involves violence, not fraud ...".

Diplock, L.J. at page 744 said:–

"Robbery is not included in the ordinary meaning of the word 'fraud' – as the Oxford Dictionary confirms. But the section is dealing with procedure in an action in the Queen's Bench Division. If the expression 'a charge of fraud' has a special meaning in this context as a term of art, that special meaning must be ascribed to it. I think it had. For at least 100 years (see Bullen & Leake's, Precedents of Pleadings, 3rd ed. (1868), 'fraud' in civil actions at common law, whether as a cause of action or as a defence, has meant an intentional misrepresentation (or, in some cases, concealment) of fact made by one party with the intention of inducing another party to act upon it, which does induce the other party to act upon it to his detriment."

No one quarrelled with the proposition that fraud must be pleaded with particularity and proved beyond reasonable doubt. Mr. Cullen submitted that however much latitude was given to the respondent there was no evidence of misrepresentation to bring fraud into the picture. What was said to be misrepresentation was merely collateral oral agreement.

Under section 340(2)(a) of the National Land Code the title or interest of any person or body shall not be indefeasible "in the case of fraud or misrepresentation to which the person or body or any agent of the person or body, was a party or privy." The section speaks of "misrepresentation" not "fraudulent misrepresentation". The Code does not define "fraud or misrepresentation". Indeed, no Torrens statute expressly defines what constitutes "fraud". However, the Privy Council has made clear in *Assets Company Ltd.* v. *Mere Roihi & Ors.*[5] that "fraud" in the Torrens system means "actual fraud" and not "constructive or equitable fraud". There a registered title was challenged on the ground, *inter alia,* that it was obtained by fraud. Their Lordships found that the registered proprietor

was not implicated in the making of any fraudulent statement, any bribery, corruption or dishonesty. In delivering the judgment of the Board, Lord Lindley, after referring to the various sections of the New Zealand Land Transfer Act, 1870 and Act of 1885 at page 210, said:–

"... by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud ..."

Under section 340(2)(a) of the Code it is expressly provided that a registered title is defeasible in the case of fraud only where its proprietor was a "party or privy" to the fraud. In a subsequent case of *Waimiha Sawmilling Company Ltd.* v. *Waione Timber Company Ltd*[6] the Privy Council held that a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transferor, acquired an indefeasible title as his mere knowledge of the existence of the adverse claim did not amount to fraud. Lord Buckmaster stated:–

"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear ..."

Fraud may also be caused by deliberately and dishonestly registering an interest and then transferring the interest even before the ink is dry to another person without the consent of the original registered proprietor. The two authorities clearly show that fraud must be actual. It must involve dishonesty of some sort. Thus fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by a deliberate and dishonest act a person is deprived of his existing right. However, Lord Buckmaster very wisely added these words:–

"It is not, however, necessary or wise to give abstract illustrations ... for each case must depend upon its own circumstances."

The contention of Mr. Cullen is that "actual fraud" is the same as the common law "fraudulent misrepresentation" and that therefore whatever happened after March 30, 1974 would be of no relevance whatsoever to the case. In other words, to succeed the respondent must prove that appellants were guilty of "fraudulent misrepresentation" on March 30, 1974. Mr. Cashin disagreed with the above contention. He thought that an attempt had been made to narrow down the field and the scope of fraud as understood under the Torrens system by equating it to the common law fraud. In his book in "Tenure and Land Dealings in the Malay States" (1st Edition 1973), beginning at page 360, Dr. David Wong makes this observation:–

"(ii) 'Misrepresentation'

Section 340(2)(a) of the National Land Code sets out, alongside 'fraud', 'misrepresentation' as another ground on which a registered title may be set aside. As in the case of fraud, the person whose title is so rendered defeasible must be a party or privy to the misrepresentation. It is not clear whether, in the light of its being placed on the same footing as 'fraud', 'misrepresentation' could be regarded as a separate ground on its own account, that is, whether or not it may be extended to include 'innocent misrepresentation'. There has not been any decision on this point. However, it would appear that the ground of 'misrepresentation' should be confined to cases which involve fraudulent or some sort of dishonest intention, although this would mean treating the specific reference to 'misrepresentation' as redundant in view of the broader provision for 'fraud'. But, to give it a wider meaning seems undesirable as it would lead to an obvious anomaly of throwing the principle of indefeasibility wide open to full equitable intervention in cases of misrepresentation whereas the provision for 'fraud' (accepting the policy rationale behind the same provision in other Torrens statutes) is intended to circumscribe such intervention in various cases of 'equitable fraud'. There seems to be no justification for letting in any such 'equitable fraud' simply because it takes the form of a 'misrepresentation'."

Mr. Cashin also referred to another book "National Land Code – A Commentary" by Judith E. Sihombing on the word "misrepresentation" as explained at page 277 onwards. The author thinks that because "the term 'misrepresentation' is limited to fraud in this section (i.e. 340), the term could be read as meaning fraudulent misrepresentation not only to complement fraud but also as an alternate ground to fraud to render a title defeasible. If the preposition 'or' is treated as conjunctive then it will be difficult to succeed for in few cases would fraud involve also misrepresentation. The better view is that the preposition 'or' is disjunctive so that 'fraud or misrepresentation' means either actual fraud or fraudulent misrepresentation or both." Mr. Cashin submitted that "fraud" in the Torrens system also included personal dishonesty or moral turpitude. In support he cited the Australian case of *Butler* v. *Fairclough & Anor.*[7] involving registration of land and allegations of fraud and breach of contract. On the facts the High Court held that there was no contract nor was there fraud to invalidate the registration in question. In the course of his

judgment Griffith, C.J. said:–

"It is settled that the term 'fraud' as used in that section imports personal dishonesty or moral turpitude."

It would seem that from the cases that "fraud" under the Torrens system is wider in meaning than the limited common law fraudulent misrepresentation. So that while it is correct to say that "fraud" under section 340(2)(a) is a far broader concept than the common law "fraudulent misrepresentation" and that though "fraudulent misrepresentation" would be "fraud" within the National Land Code, it would be totally incorrect to say that "fraud" in the Code is the same thing as "fraudulent misrepresentation". Our courts have accepted the wider view of "fraud": See *Haji Junus* v. *Chik & Anor.*[8]; *Mohd Isa* v. *Haji Ibrahim*[9]; *Public Finance Bhd.* v. *Narayanasamy*[10]; *Jasbir Kaur* v. *Tharumber Singh.*[11]

There seems to be substantial similarity between our case and the case of *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.*[12] There one Haji Mohamed Eusope owned 322 acres of land in Selangor and the appellant Loke Yew was in possession of 58 acres thereof. The respondent bought the land with knowledge of the appellant's interest. Eusope refused to sign the conveyance without a document showing that he was not selling the appellant's land. Mr. Glass, who was acting as agent for the respondent, assured Eusope that he knew the appellant and would purchase his interest. However, Eusope insisted on something in writing. Accordingly, Mr. Glass wrote out a document which stated that "As regards Loke Yew's interest I shall have to make my own arrangements." The transfer was made to Mr. Glass who then transferred it to the respondent. Thereafter an action was taken to eject Loke Yew. The Judicial Commissioner found there was fraud and dismissed the suit. The Court of Appeal of the Federated Malay States reversed the order of the Judicial Commissioner. The Privy Council restored the order of the Judicial Commissioner. With reference to the document written by Mr. Glass the observation of Lord Moulton at page 502 would be of significance and equally applicable to our case:–

"Their Lordships have no doubt that the true conclusion to be drawn from the evidence is that the above statement of Mr. Glass to Haji Mohamed Eusope was intended to be and was a statement as to present intention as well as an undertaking with regard to the future, and that statement was false and fraudulently made for the purpose of inducing Haji Mohamed Eusope to execute a conveyance which in form comprised the whole of the original grant, and that but for such fraudulent statement that conveyance would not have been executed ..."

Arul was protected, so he thought, because he was a registered proprietor. The evidence that he was in fact a nominee and therefore not a *bona fide* purchaser for value was never allowed to surface but kept in doubt before Syed Othman, J., as he then was, when Arul claimed possession of the land in *Arul Chandran* v. *Tara Rajaratnam.*[13] In the light of the recent amendment made by Arul to his defence and other evidence we cannot say the learned Judge was wrong to say that not only Syed Othman, J. but also Anuar, J.C. were misled into believing that Arul was a *bona fide* purchaser for value of the property. It is difficult to accept that a lawyer of his experience knew nothing of the matter on July 31, 1975 but came to know of something only in January, 1977. Even then he chose to cover up the matter. In order to maintain any sort of claim against Arul the respondent would first have to succeed against Suppiah and impeach his title. Under the National Land Code in order to succeed against Arul, the respondent must prove against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.

So as a *bona fide* purchaser for value as he had alleged until the mid-trial amendment of his defence Arul was protected although his vendor or any predecessor in title might have acted in bad faith. That is to say even though Suppiah or Jagindar had acted in bad faith Arul was protected. If Arul had admitted that he was not a *bona fide* purchaser for value he would not have been protected and the respondent would have a better chance of recovering her property. Jagindar, Suppiah and Arul all knew perfectly well that although on the face of it Arul was a registered proprietor in actual fact he was merely a nominee or trustee for Jagindar and therefore not a *bona fide* purchaser for value as claimed all along till the amendment. In other words, they had all along misled Syed Othman, J. and Anuar, J.C. to the detriment of Tara. They had no justification to mislead the courts into believing that Arul was a *bona fide* purchaser for value when he was a mere nominee.

A misrepresentation is a ground for relief if it is one of the causes, though not the sole cause, that induced the plaintiff to make the contract:

*Edgington* v. *Fitzmaurice.*[14] The fact that the appellants no longer have the property does not mean that the respondent cannot claim for damages for fraud.

On the evidence the learned Judge was entitled to take the view that the appellants were not honest in that the 1st appellant and the 2nd appellant never really intended to fulfil the conditions of the agreement and that all they wanted was mainly to get the respondent to sign the transfer form so that they could lay their hands on the property at a time of their choosing. As regards the 3rd appellant he must have known what was going on since he claimed himself to be the registered proprietor and denied he was a nominee. In effect he impliedly claimed to be a *bona fide* purchaser for value. He colluded with the other appellants to get possession of the property. The haste with which 2nd appellant transferred the property to 3rd appellant was part of a design to deprive the respondent of the property which was eventually put out of her reach on the property being subdivided and sold to the public. It is the act or conduct of the defrauder that the court is concerned with. Both Jagindar and Suppiah knew that Tara merely wanted the agreement to be a security agreement. Her questioning of Suppiah about the agreement and the insertion by Suppiah of the manuscript showed quite clearly that they knew it was meant to be a security agreement. They denied they acted as solicitors but were merely assisting.The learned Judge rightly rejected such a proposition.

We are here dealing with a system of conveyancing completely different from the English system. We have to be very careful when attempt was made to introduce English law in such a case. The words of Lord Dunedin in *Haji Abdul Rahman & Anor.* v. *Mahomed Hassan*[15] still ring in our ears:–

> "It seems to their Lordships that the learned judges, in these observations, have been much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment ..."

It is interesting to note that he made the above remarks in respect of a claim by the former registered owner of the land who alleged that although the ostensible transaction was an out and out sale, it was in truth no more than a *jual janji* or mortgage. There the parties entered into an agreement whereby as a security for a debt, the debtor's land was transferred to the creditor on condition that if the debtor repaid the debt within six months the land was to be reconveyed to him otherwise the agreement would become void. The debtor thought his right to redeem the property could be exercised at any time within 60 years. Held the agreement merely conferred on the debtor a contractual right and the action brought after 12 years was barred by limitation. Also, in *Bachan Singh* v. *Mahinder Kaur & Ors.*[16] Thomson, J., as he then was, referred to the difficulty and confusion which attend actions relating to land in Malaya in an attempt to force local law in conformity with conceptions of the English law. On the facts we have no reason to interfere with the findings of the learned Judge on fraud and breach of trust in the circumstances.

*Escrow*

The question of escrow has been raised both here and the court below. Mr. Cullen contended that the transfer form could be regarded as an escrow. In support he cited *Terrapin International Ltd.* v. *Inland Revenue Commissioner,*[17] a case involving payment of stamp duty. It was held in that case that a document intending to take effect as a deed on fulfilment of conditions could be executed as an escrow. It may not be effective until all the conditions were fulfilled. As a result of delay the exchange took place on May 8, 1974 and not April 30, 1974. Stamp duty became payable when the deed was executed by being unconditionally delivered on May 8, 1974. In our case the transfer form can in no way be regarded as an escrow. It was only signed by Tara and not attested at the time. The attestation was made later by Jagindar who was clearly interested in the property. He also dated the transfer form purporting to show that Tara sold the property to Suppiah when in actual fact he was the buyer. To be effective as an escrow all the formalities of a deed must be satisfied. Suppiah did not fulfil any condition of the agreement to make the transfer form effective as an escrow. In our view the basic formalities to create an escrow are lacking.

*Outright Sale or Security*

The contention of the appellants is that the agreement was an outright sale of the property with the option for Tara to repurchase within a year from the date of the execution of the agreement, that is, March 30, 1974. On the other hand, the respondent contended that the agreement was a security agreement whereby the

property would be transferred to Suppiah on payment of the two sums mentioned earlier subject to the two undertakings given by Suppiah in the form of a manuscript. The two undertakings were (i) that Suppiah would not sell the property to anyone for one year without the consent of Tara; and (ii) that he would transfer the property back to Tara on her repaying the $220,000.00 within one year. It is the submission of the respondent that the one year period is to be calculated from the time Suppiah paid the two sums and became the registered proprietor and not as contended by the appellants from March 30, 1974.

Several factors favour the contention of the respondent. The insertion of the manuscript was a clear indication that it was meant to be a security agreement rather than an outright sale. It is not unlike the Malay customary transaction known as *jual janji*. In such a transaction the borrower transfers his land to the lende on payment who takes possession of the land and may make any profit out of the land as a sort of interest payment. The borrower is entitled to have the land transferred back to him on paying the debt. However, when a period for repayment of the loan is fixed then the default to pay will convert the original arrangement into an absolute sale, *jual putus*. The learned Judge had no doubt at all that the appellants knew that Tara and Devan intended the agreement to be a security agreement by reason of the manuscript. He also pointed out that Tara had an earlier experience of such transfer and re-transfer of the property. Devan transferred the property to one H.L. Tan for $10,200.00. Later, H.L. Tan transferred it back to Tara for $10,700.00. The extra was meant to be for interest. Tara was therefore familiar with such type of transaction. Also, nowhere in the agreement was any mention made of selling and purchasing. Neither was purchaser or vendor used to suggest an outright sale. Further, if it was meant to be an outright sale the usual practice of payment within a reasonable time, say within a week, must be followed. Suppiah conceded as much when cross-examined that such was the practice in an outright sale. Further, the correspondence referred to earlier between Suppiah & Singh and the CKB do not seem to support an outright sale. In P.33 (Volume 8 page 179) Suppiah made a statutory declaration in support of an application for a caveat under section 323 of the National Land Code stating that by virtue of an agreement dated March 30, 1974 made between him and Tara it was agreed that Tara "would transfer the land to him". The statutory declaration was made on February 2, 1975, the very day the firm of Suppiah & Singh wrote to the CKB to say they acted for Suppiah implying that they were no more acting for Tara and Devan. This clearly suggests that there was as yet no actual transfer or sale.

The whole exercise was initially to assist Dr. Das financially by arranging payment to Jagindar of the money he paid the HKBC as a guarantor. The fact that Devan could still continue to operate the account with the CKB and even arrange to create a fourth charge thereby burdening the property with more debt is clearly inconsistent with the appellants' claim of an outright sale. That P.30 and P.31 did not affect the CKB was obvious when the bank asked Devan to reduce the overdraft (P.40) and also when the bank asked for the return of the title deeds and duplicate charges (P.42). The Statutory Declaration further shows that Suppiah knew how much he had to pay when he referred to the manner of payment. He was to pay $103,684.44 to the bank and all further interest up to the date of actual transfer and also to pay $110,000.00 to Jagindar who will pay HKBC the money and interest in discharging the overdraft of Dr. Das. There is no reason for us to disagree with the learned Judge that the agreement was a security agreement and that the one year period commenced to run from July 5, 1975. Until Suppiah became the registered proprietor upon payment of the agreed sum Tara had no reason to buy back the property when she was still the registered owner. Why should she buy her own property when she received no benefit from the transaction? Unless Suppiah satisfied the consideration agreed he had no right to the property. The evidence shows clearly that Suppiah had no intention of paying off the CKB within a reasonable time; that although he put himself out as owner when the transfer was executed on July 5, 1975 he was not so as it was Jagindar who put up the money; that he merely pretended to give Tara a year within which to redeem her property; that in fact he had no intention of allowing Tara any opportunity of redeeming her property at all.

*Undue Influence*

It has already been shown that a solicitor-client relationship existed between Suppiah and Jagindar and Tara. No one disputed that Devan was acting as Tara's agent during the negotiation. Appellants certainly took advantage of their

relationship though they said that they were merely assisting Tara. If they were not acting for Tara then they had acted rather unethically and for their own advantage in furthering their design to acquire the property. They used not only their professional position but also their social status in exercising undue influence over Tara and Devan. Clearly Devan was under their undue influence earlier as he dealt with them from the beginning. When they visited Tara's house not a word was said about Jagindar being the attestor of the transfer. We were told Jagindar and Sivanathan were merely accompanying Suppiah there. We see from the evidence that Jagindar was interested in the property. Suppiah and Arul were his nominees. They contributed not a cent. Yet Suppiah tried to impress the learned Judge that he had the means to buy the property. Why did he not pay? Because he was never really interested in the property from the very beginning judging from his conduct. Hence, he never paid anything at all. In order to show that Suppiah was the owner Jagindar tried to convince the court that Suppiah instructed him to pay both the HKBC and the CKB. Considerable tactical changes were made by Suppiah and Jagindar as a result of an amendment made by Arul to his defence seven days after the trial began. That Jagindar was the true owner became clear when he caused Suppiah to transfer the property to Arul who later transferred it to Jet Age Construction Company. Jagindar and Suppiah knew about the approval of the subdivision which was purportedly applied by Arul. The eventual subdivision of the property into 70 lots and sale to the public made it impossible for Tara to recover her property. That Arul was a non-resident and would be more favourably considered by the local authority in the application for subdivision was merely part of a design to deprive Tara of her property. We cannot see how a non-resident can have an advantage over a citizen in matter of subdivision. To achieve the objective Suppiah had to breach the contract. That was no problem to him since he never intended to fulfil the conditions of the agreement. That was an unfair advantage taken over Tara.

Appellants contended that under section 16 of the Contracts Act to succeed on the claim of undue influence Tara must establish a solicitor-client relationship. This had also been established. If the transaction was shown to be unconscionable then the burden shifted to the appellants to show that the contract was not induced by undue influence under section 3 of the Act. In *Inche Noriah* v. *Shaik Allie bin Omar*[18] an old and illiterate Malay woman executed a deed of gift of a landed property in Singapore in favour of her nephew who had the management of her affairs. Before executing the deed the donor had independent advice from a lawyer who acted in good faith. However, he was unaware that the gift constituted practically the whole of her property and did not bring home to her mind that she could prudently, and equally effectively, have benefited the donee by bestowing the property upon him by a will. Held that the gift should be set aside as the presumption which arose was not rebutted. Lord Hailsham, L.C. stated at page 136:–

> "In the present case their Lordships do not doubt that Mr. Aitken acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties ..."

In *Allison* v. *Clayhills*[19] the court held that at the time of the transaction there was a solicitor-client relationship. Similarly, in *Edwards* v. *Williams*[20] where it was held that the case was not one strictly within the rules applicable to dealings between solicitor and client. Also, that there was no evidence of unfair advantage being taken of the client by the solicitor.

Mr. Cullen submitted that the learned Judge was wrong on the question of "unconscionable" and he was therefore wrong in saying that the burden had switched to the appellants. All these cases merely go to show that each case has to be decided according to its particular facts. We do not think the learned Judge was wrong on the facts of this particular case to say that the transaction was unconscionable and that the burden was upon the appellants to rebut the presumption of undue influence.

*Breach of Agreement and Variations*

It must be remembered that the agreement was prepared by Suppiah. Before inserting the two amounts he must be assumed to have made

inquiries. He certainly did in the case of the CKB as shown earlier on in the long line of correspondence. If the agreement was an outright sale as contended by the appellants then Suppiah must follow the normal local practice of paying the $220,000.00 within a reasonable time, certainly not more than a week. Both payments of $121,619.80 to the HKBC on April 27, 1974 and $92,000.00 on July 5, 1975 were made by Jagindar. Payment was conveniently made the moment Devan reduced the overdraft to the tune of $40,000.00, a loan he obtained from his friend Anandan. Suppiah in actual fact paid nothing out of his own pocket. It seems that Jagindar was using his firm, his partner Suppiah and his friend Arul in acquiring the property. He kept in the background all the time. He knew he was buying the property yet he chose to attest the transfer form which he obtained earlier to make sure that Tara would not get it back by a series of transfers. There is much to be said in such a situation that appellants should advise Tara to get independent legal advice on the matter. The general view is that if a solicitor is involved in a matter as a solicitor he might have to get another solicitor to do the attestation. The conflict of interest is very clear. The self interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect the property of his client may interfere with his exercise of free judgment on behalf of his client. This was clearly in the mind of the learned Judge.

Mr. Cullen submitted that the learned Judge did not give weight to the variations in the conditions of the agreement. Evidence of variations included the payment of $121,619.80 when the agreement stipulated only $110,000.00; Devan continuing to operate the account at the CKB for a year after the signing of the agreement; Tara being allowed to continue occupying the house on the land after the expiration of one year in return for compensation; payment of $92,000.00 to the CKB instead of $110,000.00 as in the agreement. It is the contention of the appellants that they could only be sued for breach of contract, if any, and that the agreement was made with free consent and there was no undue influence or misrepresentation or fraud. He said this was a case of breach of contract dressed up as a case of fraud. Therefore, Mr. Cullen submitted that the learned Judge was wrong in coming to the conclusion that the appellants were liable for breach of trust and fraud on grounds that an unconscionable bargain had been made in favour of appellants themselves. He pointed out that many people broke contracts when they found it profitable to do so but that did not make it fraudulent. We do not quarrel with this proposition. But it is important to bear in mind each case must be decided in accordance with its particular facts. That was what the learned Judge did.

By taking action against Dr. Das in Singapore Suppiah clearly elected to forego his security in the property and to treat Dr. Das as a debtor. Tara should have been released from any obligation to assist Dr. Das. The judgment against Dr. Das was registered in the High Court in Johore Bahru. It is not in dispute that the judgment included the sum of $110,000.00 referred to in the agreement. The clear implication is that reference to $110,000.00 in respect of Dr. Das's indebtedness to the HKBC must be regarded as extinguished by the judgment. We, however, were told of the ridiculous suggestion that the judgment was for Tara's benefit. Not surprisingly, the learned Judge considered such action a breach of the agreement. The late payments to the two banks concerned were also regarded as breaches. The agreement of March 30, 1974 was actually a farce as Suppiah never intended to act on it. All he was interested was to get the transfer form signed by Tara. To prevent Tara from getting her property back Suppiah and Jagindar got Arul to help by posing as a registered proprietor when in actual fact he was merely a nominee. Thus Arul was instrumental in ousting Tara and family from her house and helping Jagindar to acquire the property by transferring it to Jet Age Construction Co. Arul seemed to think that he had done nothing wrong even when he must have known that he was being used to cheat Tara of her property. He had done everything he could to prevent Tara from setting aside the transfer, to the extent of not disclosing that he was a nominee. For an advocate and solicitor to mislead the court is a serious matter. Strong disciplinary action must be taken against such an advocate and solicitor.

If Mr. Cullen is right that there was a variation then there could be no breach of any contractual terms. On the other hand, Mr. Cashin quite correctly asked how could there be variation when the appellants contended that the agreement was an outright sale. A perusal of the correspondence between the CKB and Suppiah & Singh does not support any variation. Suppiah agreed to pay two equal sums of $110,000.00 each. The learned

Judge accepted that there was no variation hence he gave no weight to the contention. We agree with him on this point.

To sum up Mr. Cullen's case it is that on the evidence there is no fraud, breach of trust or undue influence except for breach of contract if the court considers that there is no variation. On the other hand, Mr. Cashin's case is that the findings of the learned Judge were all based on questions of fact. The appellants were merely attacking the learned Judge's finding of fact and his assessment of the credibilities of the witnesses. On the evidence the learned Judge was justified in all his findings of fact.

If on the evidence the appellants had been found guilty of actual fraud so that an action of deceit would succeed it would be wrong to allow a case where one of the main charges was fraud to be hammered into a comparatively harmless case based on breach of contract. If the words of the appellants amount to a mere promise, they cannot be the basis of an action of tort. Further, they impose no liability on the appellants unless they conform to all the requirements of a valid contract. A statement of opinion, if wilfully false, is actionable as a tort: *Jorden* v. *Money*.[21] The action was in actual fact one of deceit and it was necessary to prove actual fraud. This was clearly laid down in *Derry* v. *Peek*[4] that fraud must be proved by showing that the false representation had been made knowingly or without belief in its truth or recklessly without caring whether it was true or false. All that the appellants wanted was to secure the property from Tara. To do so they had to get the transfer form signed. They did so by putting up an agreement for Tara to sign making her believe by inserting a manuscript that it was a security agreement for a loan. They had no intention of fulfilling the condition of the agreement. If we are to believe them that it was an outright sale then it was ridiculous for them to raise the question of variations of contract because we would expect them to pay off within a reasonable period according to accepted local practice.

*Land Valuation*

Mr. Cullen submitted that the learned Judge erred in rejecting the expert evidence of a land valuer called by the appellants regarding the valuation of the property. He contended that the bench has to be guided by expert evidence if it was not challenged as was the case of the expert called by the appellants. This so called expert dealt with the property when he was in the Government service. His valuation is the same as the valuation given many years ago as a Government valuer. In other words, the value of the land remains stagnant. The expert said that the value of $220,000.00 in 1974 in respect of the land was reasonable and would also be a fair price in July 1975. Mr. Cullen said the figure arrived at by the expert was based on the sale value of comparable pieces of land and the two experts called by the respondent did not make any comment on comparables and neither could they identify the people whose opinions they sought in making the valuation when they were challenged to do so. The method used by them was "novel" and "wholly unknown". One of the experts for the respondent valued the property at $701,400.00 made up of $653,000.00 for the land and $48,000.00 for the house on it. In the circumstances, Mr. Cullen submitted that it was outside the jurisdiction of the learned Judge to "pluck out of the air" the price of $1.70 cents per square foot and arrive at a figure of $370,260.00 as the price of the land in July 1975. The figure arrived at by the learned Judge was against the weight of the evidence. The learned Judge erred in adding value to the house to that of the land as the house would have to be demolished if the land was to be subdivided for property development. This method is not really "novel" as suggested. It has been accepted locally in a good number of cases on acquisition. The fact that the house would be demolished if the land was to be subdivided for property development is not really relevant in this "novel" type of valuation. It is the submission of the appellants that the valuation of $220,000.00 was generous as the highest comparable figure at the time was $37,000.00 per acre which worked out to $185,000.00 for the whole property.

It is interesting to point out that in 1974 it would seem that the appellants had accepted and relied on the valuation report of Chong Kim Seng (D.W.1) dated February 26, 1972 to purchase the property for $220,000.00. However, they now contend that in July, 1975 after a matter of 3½ years the property was worth $35,000.00 less than what it was worth in February, 1972. This would mean that Chong Kim Seng was good enough for the appellants in 1972 but not in 1981. We are, however, concerned with the value to Tara rather than to the appellants. To the deve-

loper the house might be of no value as it was to be demolished for development. But it was of great value to Tara. So her loss of the property would include the house.

The experts were there to guide the learned Judge. He was not bound to accept their opinions, particularly where they conflicted. He had to do the best he could on the material before him. In *Loi Hieng Chiong* v. *Kon Tek Shin*[22] Syed Othman, F.J., in delivering the judgment of the court, took the opportunity to say something about valuation of land in this country in these words:–

"... Considering the number of land cases passing through the courts nowadays, the courts are entitled to take cognisance of land values in a given area in this country. One does not have to be a valuer to know that in Kuching and surrounding areas, land has shot up in value by reason of the tremendous expansion of the town ..."

That was precisely what the learned Judge did in the instant case. It would of course be of assistance if he were to cite a few cases to show that the land in a particular area had shot up because of development.

*Building Up Case*

On the point that the respondent had built up her case against appellants Mr. Cashin said that that was to be expected because she did not have all the facts before her. He submitted that she built up her case of breach of trust and fraud against the trio with a consistency that was remarkable. Correspondence between the legal firm of Suppiah & Singh and the CKB as well as correspondence involving the legal firm of Yeow & Chin which were never suspected to have existed gradually came to the respondent. All these correspondence pointed to a grand design of fraud by the appellants. It was clear that Suppiah and Jagindar were acting as solicitors when they wrote to the CKB about paying off the respondent's charge with the bank for an overdraft by charging her property. The fact that they asked the bank for a statement of account for the amount due to it and for the title deed and duplicate charges was clear evidence that they were acting as her solicitors. They continued to so act until February 2, 1975 when they suddenly said they were acting for Suppiah who was buying the property from the respondent for whom they were previously acting as solicitors. A lawyer should not use information acquired in the course of representing a client to the disadvantage of the client. He should not use it except with the consent of the client after full disclosure of such information for his own purpose. Breach of ethics and codes of conduct is different from breach of contract. Unless steps are taken to inquire into the professional conduct of such solicitors not only the courts but also the general public would lose confidence in the integrity of the profession in this country.

*Damages*

Mr. Cashin submitted that the learned Judge was right in deciding that the appellants were not entitled to a deduction of whatever sums that might have been paid in the calculation of damages on the ground that fraud was perpetrated to obtain the property. He alleged that they first cheated the respondent of the property and then tailored their evidence to suit the allegations brought against them. The learned Judge decided to believe the respondent's evidence rather than the appellants' in weighing her consistency against their vacillations. He awarded the damages on the basis of fraud and stated that the award would be the highest attainable and would necessarily cover the claim for undue influence, breach of contract, and trust as well.

Mr. Cullen submitted that fraud must be pleaded and proved beyond reasonable doubt. He said the facts must be presented within the framework of the law and that a mere flood of evidence without legal issues and principles firmly planted in the mind would not suffice. The law, he submitted, does not provide for damages for the six grounds set out in the statement of claim of so called fraud, five of which were unsupported by evidence. The only remedy if there was any breach should be on the basis of an amount of profit. He took exception to the fact that Mr. Cashin did not mention in court fraud and damages for dishonesty in his opening submission. He submitted if there was any breach it was breach of contract in that the land was transferred prematurely to a third party and non payment in accordance with the contract. There would be such breach only if the court found there was no variation in the agreement of sale. If so, the appellants would be liable for $18,000.00 only with interest on this sum from the date of breach. The interest was to be treated as compensation for being allowed to stay on the land till end of 1975. If the learned Judge was right that the price was $370,000.00 then what was due to the respondent was $150,000.00 taking

into consideration the $220,000.00 already paid for the land.

In his written submission in the lower court which he adopted in this court Mr. Cashin pointed out that the $18,000.00 was the short payment overlooked in the course of and arising out of their breach and fraud and was not the loss to Tara. Had the contract been performed on or within a week of March 30, 1974 the results would be as follows:–

(I) Tara would have received from Suppiah $6,000.00;

(II) The CKB would have been paid $103,658.44; and Tara

(a) would not have been harassed by the CKB to pay up or reduce her overdraft;

(b) would not have to pay at the rate of $100.00 per month as interest;

(c) need not have borrowed from Anandon $40,000.00;

(d) need not have consented to create a further charge on the property and incurred expenses therefor;

(III) The HKBC would have been paid and Dr. Das would have been released from his debts and he would not have been dragged into litigation and sued and a judgment obtained against him in the High Court in Singapore for $149,000.00 and the said judgment registered in the High Court in Johore Bahru;

(IV) Tara would have one year from July 5, 1975 to seek assistance elsewhere to redeem her property;

(V) Only when Tara could not definitely repay that Suppiah could sell the property to a third party. After paying Suppiah the balance could have been used to buy a property for Tara. In which case she would not have to do battle in court for almost 8 years. She would not have been evicted against her will and forced to live in a rented house;

(VI) Most important Tara and her family would not have been subjected to inconvenience, mental distress, agony and suffering.

In the light of the above the claim by the appellants that she suffered no loss at all or that her loss was only $18,000.00 is plainly unacceptable.

Mr. Cashin submitted that in assessing the quantum of damages whether in contract or tort the result would not be very different in this case. The learned Judge chose to make a single award. The appellants said the respondent ought to be asked to elect one of the three types of damages, namely damages for breach of contract, damages for breach of trust and compensatory or aggravated damages. According to Mr. Cashin this would jeopardise the position of the respondent on appeal. It could result in the case being sent back for assessment of damages. We can see nothing in either in the Courts of Judicature Act, 1964 or in the Rules of the High Court, 1980 to make separate verdicts and judgments invariably necessary in respect of separate causes of action contained in the same writ. The matter is discussed and set out in *McGregor* on Damages, 14th Edition, page 1031, paragraphs 1533 and 1534. The position seems to be that "either a court should always make separate awards but a single award will not be upset in the absence of prejudice, or a court has a discretion to make a single award but should make separate awards if a single award could lead to prejudice." The appellants have not shown how the single award in this case would be prejudicial to them. We do not think the learned Judge has exercised his discretion wrongly in making a single award in the circumstances.

*Conclusion*

In the case of undue influence and breach of trust the usual relief would be an order for specific restitution of the property; but where this is not possible then an order for account of the proceeds from the disposition of the property may be made. As the property had been subdivided into lots and sold to members of the general public who are innocent third party purchasers neither specific restitution nor account would be possible in the circumstances.

With regard to damages *Salmond* on Torts, 17th Edition at page 531 notes:–

> "The general rule today is that damages are compensatory whether in contract or tort. The function of damages is therefore to put the person whose right has been invaded in the same position as if it has been respected."

Our law is substantially the same as the English law.

In assessing damages the learned Judge has clearly kept in mind the purpose and aim of the

compensation, whether for breach of contract or fraud, the general rule of putting "the person whose right has been invaded in the same position as if it had been respected." He has considerable experience in matters relating to land valuation having been assigned to deal with such cases. As he had the advantage of seeing and hearing the witnesses, particularly as to the location of the land, its development potential and other related matters he would be in a better position, in view of the conflicting opinions of the experts, to assess the market value of the property. The value so assessed and awarded would become and form part of the general damages.

Having decided upon the quantum of damages the learned Judge had to consider whether the sum of $92,000.00 paid to CKB and the sum of $121,819.00 paid to HKBC should be deducted from the quantum of damages. In his view the two sums were paid in pursuance and furtherance of fraud and therefore unenforceable and irrecoverable under section 24 of the Contracts Act, 1950 which reads:–

"The consideration or object of an agreement is lawful, unless –

(a) it is forbidden by law; or

(b) it is such a nature that, if permitted, it would defeat the provisions of any law; or

(c) it is fraudulent; or

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Section 24 merely codifies and enacts the common law so that both the Act and the common law are in effect saying the same thing. The two sums, as found by the learned Judge, were not made in pursuance of the contract. They were paid outside the contemplated period for the benefit of and to suit the convenience of the appellants. Tara could not be expected or obliged to pay as if the contract has been performed. The ability or inability to repay is therefore irrelevant. It is therefore not surprising that the learned Judge refused to deduct the two sums. Dealing with the provisions of section 24 the Privy Council in *Palaniappa Chettiar* v. *Arunasalam Chettiar*[23] held that the original transfer of land from the father to the son was for a fraudulent purpose and the court would not lend its aid to secure a reconveyance to the father.

The learned Judge had gone into the case very thoroughly and carefully. On the evidence the learned Judge found all appellants liable for fraud. He found Jagindar and Suppiah liable for breach of contract, undue influence and breach of trust. As stated earlier the property had been subdivided and sold to the general public so that specific restitution was not desirable or possible. An order for account of the proceeds from the sale of the property is not desirable in the circumstances as it will take time and cause great inconvenience. In the exercise of his discretion the learned Judge decided to do the best he could in assessing damages. In awarding such damages the court is not obliged to go into any meticulous arithmetical calculations of general damages.

The proper mode of giving relief posed some difficulties for the learned Judge. He decided to award damages for fraud which would also cover other heads of damages. It was suggested that the proper order was one calling for an inquiry as to damages. The measure of damages may not be the same in an action for fraud as in an action for breach of contract or undue influence or breach of trust. Money compensation may not always be an adequate substitute for the deprivation of one's property. We think only in exceptional cases should an appellate court not having the advantage of seeing the witnesses in the box differ from the finding of fact of the trial Judge who tried the case. As Jessel, M.R. remarked in *Redgrave* v. *Hurd*[24]:–

"... The rule of the court of appeal is that when there is direct conflicting oral testimony, and the Judge who had seen the witnesses believes one party and disbelieves the other, this court, not having seen the witnesses, cannot disturb that decision any more than it could disturb the verdict of a jury under similar circumstances ..."

It is really a disgrace that solicitors and advocates should descend to such level to deprive a client of her property and forcing her to fight a rearguard action for almost eight years before right could be done during which time apart from financial difficulty she not only lost her property but also her husband. So that during this period she must have suffered considerable agony of mind.

For reasons given we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

*Appeal dismissed.*

Solicitors: *Shearn Delamore & Co.; Allen & Gledhill; Subra Naicker & Co.*